No. 82-975

Office-Supreme Court, U.S.
FILED
JUN 23 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MEMBERS OF THE CITY COUNCIL OF THE CITY OF LOS ANGELES, et al.,

Appellants,

—vs.—

TAXPAYERS FOR VINCENT, an unincorporated political association, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN AND SOUTHERN CALIFORNIA IN SUPPORT OF APPELLEES

ROGERS, JOSEPH, O'DONNELL & QUINN
*NEIL H. O'DONNELL
LEO F. ORENSTEIN
505 Sansome St., 14th Floor
San Francisco, CA 94111
(415) 956-2828

MARGARET C. CROSBY
ALAN L. SCHLOSSER
AMITAI SCHWARTZ
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
1663 Mission Street
San Francisco, CA 94103
(415) 621-2493

FRED OKRAND
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA
633 S. Shatto Place
Los Angeles, CA 90005
(213) 487-1720

Attorneys for Amici Curiae

*counsel of record

QUESTION PRESENTED

Whether a local government may, consonant with the guarantees of the First and Fourteenth Amendments of the United States Constitution, absolutely prohibit the posting of political campaign signs on utility poles and similar public property.

TABLE OF CONTENTS

	Page No.
QUESTION PRESENTED.....	i
INTEREST OF AMICI.....	1
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENT.....	4
ARGUMENT.....	7
I. THIS COURT HAS REPEATEDLY INVALIDATED ABSOLUTE PROHIBITIONS OF PARTICULAR MODES OF EXPRESSION IN A TRADITIONAL PUBLIC FORUM.....	7
II. THIS ORDINANCE'S PROHIBITION OF POSTING ON PUBLIC PROPERTY VIOLATES PROTECTED FIRST AMENDMENT RIGHTS.....	14
A. The Temporary Political Signs Related to Election Campaigns at Issue Here are Entitled to the Greatest Possible First Amendment Protection.....	15
B. The Ordinance Bans a Means of First Amendment Expression in the Traditional Public Forum.....	17
C. More Narrow Means Than an Absolute Ban are Available to Achieve the City's Legitimate Interests.....	23

TABLE OF CONTENTS
(Continued)

Page No.

D. Equivalent Alternative Means of Expression Are Not Available and Would, in any Case, be Irrelevant..... 33

III. THE ORDINANCE VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT BECAUSE IT HAS A DISPROPORTIONATELY SEVERE IMPACT ON THE RIGHTS OF EXPRESSION OF THOSE LEAST ABLE TO PROTECT THEMSELVES..... 36

CONCLUSION..... 42

TABLE OF AUTHORITIES

Cases:	Page
Adderley v. Florida, 385 U.S. 39 (1966)	21
Anderson v. Celebrezze, ____, U.S. ____, 103 S.Ct. 1564 (1983)	40,41
Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976)	28,33,37
Brown v. Louisiana, 383 U.S. 131 (1966)	21
Buckley v. Valeo, 424 U.S. 1 (1976)	37
CBS, Inc. v. F.C.C., 453 U.S. 367 (1981)	37
Cantwell v. Connecticut, 310 U.S. 296 (1940)	20
Carey v. Brown, 447 U.S. 455 (1980)	29,36
Garrison v. Louisiana, 379 U.S. 64 (1964)	37
Grayned v. City of Rockford, 408 U.S. 104 (1972)	18-19, 21,22,24
Greer v. Spock, 424 U.S. 828 (1976)	21
Hague v. C.I.O., 307 U.S. 496 (1939)	18,20

TABLE OF AUTHORITIES
(continued)

Cases:	Page
Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559 (1981)	25
International Brotherhood of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957)	9
Jamison v. Texas, 318 U.S. 413 (1943)	9,10,19
Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977)	33
Lovell v. Griffin, 303 U.S. 444 (1938)	20
Martin v. City of Struthers, 319 U.S. 141 (1943)	9,10-11, 19,34
Metromedia, Inc. v. City of San Diego, 26 Cal.3d 848	16-17
Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882 (1981)	8,12,16 17(note), 29-30
Mills v. Alabama, 384 U.S. 214 (1966)	16

TABLE OF AUTHORITIES
(continued)

Cases:	Page
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)	15
Murdock v. Pennsylvania, 319 U.S. 105 (1943)	20
N.A.A.C.P. v. Button, 371 U.S. 415 (1963)	11,13
Niemotko v. Maryland, 340 U.S. 268 (1951)	14,20,24, 26
Perry Education Association v. Perry Local Educators' Association, ___ U.S. ___, 103 S.Ct. 948 (1983)	18,22-23
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)	36
Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)	12,34
Schneider v. State, 308 U.S. 147 (1939)	9,10,12 13,19, 20-21,26 35
Shelton v. Tucker, 364 U.S. 479 (1960)	24

TABLE OF AUTHORITIES
(continued)

Cases:	Page
Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)	20,22, 30-31
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)	34
Storer v. Brown, 415 U.S. 724 (1974)	38
Sussli v. City of San Mateo, 120 Cal.App.3d 1, cert. denied, 454 U.S. 1085 (1981)	2
United States v. Douglass, 579 F.2d 545 (9th Cir. 1978)	22
United States v. Grace, ___ U.S. ___, 103 S.Ct. 1702 (1983)	9,11,19, 24
Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)	13,20
Statutes and Court Rules:	
Municipal Code of Los Angeles §28.04	3
§28.03	4

TABLE OF AUTHORITIES
(continued)

Books:	Page
J. Ely, Democracy and Distrust: A Theory of Judicial Review 106 (1980)	39-40
The Federalist No. 10 (J. Madison)	38

INTEREST OF AMICI

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan, membership organization dedicated to the preservation of the rights protected by the First Amendment among other rights found in the Federal Constitution. The ACLU of Northern and Southern California are regional affiliates of the ACLU. Since its inception, the ACLU has been especially concerned with the constitutional right of expression, and committed to preserving the greatest opportunity for wide dissemination of ideas, opinions, and information. In pursuit of its commitment to free expression, the ACLU has frequently participated in litigation concerning application of settled constitutional doctrine to a vast variety of methods by which government would otherwise restrain free expression. Recently, for example, attorneys for the ACLU of Northern

California acted as co-counsel of record for the plaintiff in Sussli v. City of San Mateo, 120 Cal.App.3d 1, cert. denied, 454 U.S. 1085 (1981), a case resembling this one.

The ACLU and its regional affiliates in California believe that a blanket restriction on the right to post temporary signs on utility poles and similar public fixtures is an unconstitutional and unwarranted abridgment of the First Amendment, because less drastic means are available to meet the cities' legitimate interests.

Therefore, we respectfully submit this brief to urge that the decision of the Court of Appeals for the Ninth Circuit be affirmed.*

---

* Counsel for both parties in this case have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk of this Court.

STATEMENT OF THE CASE

Appellee Taxpayers for Vincent ("Taxpayers") was an association formed to support Roland Vincent in his 1979 campaign for election to the Los Angeles City Council. Appellee Candidates' Outdoor Graphic Service ("COGS") is in the business of putting up temporary political campaign signs. COGS contracted with Taxpayers to post signs in support of Vincent's candidacy.

Appellees commenced this action to challenge the constitutionality of Los Angeles Municipal Code section 28.04 ("the ordinance") which absolutely proscribes sign-posting on all public property. Specifically, Section 28.04 provides:

> No person shall paint, mark, or write on, or post or otherwise affix, any hand-bill or sign to or upon any sidewalk, crosswalk, curb, curbstone, street lamp, post, hydrant, tree, shrub, tree stake or guard, railroad trestle, electric light or power or telephone or telegraph or trolley

> wire pole, or wire appurtenance thereof or upon any fixture of the fire alarm or police telegraph system or upon any lighting system, public bridge, drinking fountain, life buoy, life preserver, lifeboat, or other life saving equipment, street sign, or traffic sign.

Los Angeles permits the posting of signs on private property pursuant to Los Angeles Municipal Code section 28.03.

The district court denied interim relief, and subsequently granted summary judgment for the City, upholding the ordinance against constitutional attack. The Court of Appeals for the Ninth Circuit reversed, holding that the absolute ban on sign-posting violates the First Amendment.

At the City's instance, this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

This is a First Amendment sign posting case. It is the latest in a long series in which the Court has considered the propriety of an absolute ban on a

traditional means of expression in the public forum. The result here should be no different than in those previous cases -- the ban should be struck down as a violation of the First Amendment.

Any regulation of First Amendment activity on public property is permissible only to the extent that it is narrowly drawn to serve compelling state interests.

For two reasons the Court should apply this test particularly strictly to the ordinance at issue here, which totally bans signs from utility poles and all other possible places for posting on public property. First, the signs prohibited qualify as political speech related to an election campaign where the First Amendment has its most urgent application. Second, the ban encompasses the public streets and sidewalks long recognized as specially protected forums for the exchange of views.

The ordinance at issue here fails this First Amendment test. Temporary posting of carefully regulated political campaign signs is not basically incompatible with the normal use of such public property. The City has already demonstrated that its interest in traffic safety and aesthetics does not preclude sign posting since it permits such posting on private property. The City's legitimate interests in traffic safety and aesthetics can be substantially achieved by much more narrowly drawn regulations proscribing the size, placement, construction and timing of temporary signs on public property.

The ordinance also violates the Equal Protection clause. By banning sign posting on public property while permitting it on private property, Los Angeles effectively limits use of this particularly affordable means of political campaigning to those with control of private property.

The result is that on issues and in elections where the interests of property holders and non-property holders are opposed, sign posting will be available only to property holders. This discrimination is of particular concern because it is the poor, those least able to afford other increasingly expensive means of political campaigning, who are least likely to control private property on which they may post their views on issues or candidates.

ARGUMENT

I. THIS COURT HAS REPEATEDLY INVALIDATED ABSOLUTE PROHIBITIONS OF PARTICULAR MODES OF EXPRESSION IN A TRADITIONAL PUBLIC FORUM

The ordinance at issue here works an absolute prohibition on the posting of political campaign signs--and virtually all

other types of signs--on public property.* It is not a restriction of time, place, or manner since "[s]igns that are banned are banned everywhere [on public property] and at all times." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 2896 (1981). Hence, it is not appropriate to analyze the ordinance to determine whether it impermissibly restricts "the time, place, or manner of expression." Rather, the appropriate question is whether a blanket ban on sign posting at all times, on all public places, and in every conceivable manner, survives the strict scrutiny required by the First Amendment.

---

*The City misleadingly characterizes the ordinance as merely prohibiting sign-posting on "specified categories of public property." While it is true that the ordinance specifies particular categories of public property to which signs may not be attached, the list of categories is exhaustive. Tellingly, the City fails to identify any type of public property on which the ordinance does not bar sign-posting and neither court below identified any such property.

This Court has a long tradition of striking down outright bans on particular types of expression in the traditional public forum. See, e.g., Schneider v. State, 308 U.S. 147 (1939) (blanket prohibition on leaflets); Jamison v. Texas, 318 U.S. 413 (1943) (prohibition of handbills); Martin v. City of Struthers, 319 U.S. 141 (1943) (prohibition on ringing doorbells to distribute pamphlets); International Brotherhood of Teamsters v. Vogt, Inc., 354 U.S. 284, 295 (1957) (blanket prohibitions on picketing). United States v. Grace, ___ U.S. ___, 103 S.Ct. 1702 (1983), (blanket prohibition of leafletting and picketing on sidewalks in front of Supreme Court building). In each case the Court has found that the First Amendment requires the government to find some way to accommodate the means of expression involved.

The Court has reached this conclusion no matter what interest the government identifies as justifying the absolute ban. For example, in Schneider, the government argued that an ordinance prohibiting distribution of handbills on public streets, sidewalks or in parks was constitutionally proper because it would prevent littering. The Court responded that

> the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it.

308 U.S. at 162.

In other cases similar governmental interests have also been rejected as insufficient counter-weights to the First Amendment. For example, control of fund raising was rejected in Jamison v. Texas, as was citizens' peaceful enjoyment of their home and prevention of crime in

Martin v. City of Struthers. Protection of public property and maintenance of proper order and decorum were held to be insufficient in themselves in United States v. Grace.

Each of these important interests have been rejected as justifications for a total ban on a means of expression in the public forum because the interests protected by the First Amendment "are delicate and vulnerable, as well as supremely precious in our society." Cf., N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963). Although all of these interests have been recognized as substantial, none of them can constitutionally be achieved by elimination of an entire means of expressive activity, rather than by some more narrowly drawn regulation of time, place, or manner.

In past decisions the Court has been fully cognizant of the importance of the varied interests advanced in opposition

to free expression and of the right and responsibility of local officials to protect other interests by constitutional means. See, e.g., Schneider v. State, 308 U.S. at 161. The Court has also repeatedly recognized that

> Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.

Schad v. Borough of Mount Ephraim, 452 U.S. 61 101 S.Ct. 2176, 2183 (1981) and Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S.Ct. 2882, 2898 (1981) quoting Schneider v. State, 308 U.S. at 161.

As a result, the Court has repeatedly insisted that courts must take upon themselves "the delicate and difficult task" of determining whether particular regulations of First Amendment rights are

justified by the interests advanced by government officials. Id.

The test which courts are to use in carrying out their task is a stringent one. While a community may serve its legitimate interests,

> it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms....'Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone....' NAACP v. Button, 371 U.S. 415, 438 (1963).

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637 (1980).

When strict scrutiny is applied here, the conclusion must be the same one reached throughout modern constitutional history -- an absolute ban of a protected means of expression on public property cannot stand.

II. THIS ORDINANCE'S PROHIBITION OF POSTING ON PUBLIC PROPERTY VIOLATES PROTECTED FIRST AMENDMENT RIGHTS

In his opinion in Niemotko v. Maryland, 340 U.S. 268, 282 (1951), Justice Frankfurter suggested four questions which courts have considered in reconciling free expression of ideas in public places with protection of public peace and property. The four were:

(1) What mode of speech is regulated?

(2) Where does the speaking which is regulated take place?

(3) What is the method used to achieve such ends as a consequence of which public speech is constrained or barred?

(4) What is the interest deemed to require the regulation of speech?

Consideration of those questions as applied to the facts of this case aids in understanding why the ordinance at issue fails to withstand constitutional analysis.

The answers to the first two questions help explain why the Los Angeles ordinance must be subjected to the strictest possible scrutiny and the answers to the second two questions demonstrate why the ordinance cannot survive that scrutiny.

A. The Temporary Political Signs Related to Election Campaigns at Issue Here are Entitled to the Greatest Possible First Amendment Protection

The mode of speech regulated by Los Angeles' ordinance is temporary signs and, as applied in this case, temporary political signs related to an election campaign. It is hard to imagine expression more clearly entitled to the complete measure of First Amendment protection.

The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office" Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971), since elections are at the heart of our

democratic process. As a result, regulation of speech concerning elections is subject to strict scrutiny. Mills v. Alabama, 384 U.S. 214 (1966) (prohibition on publication of editorials related to candidates or issues on election day violates First Amendment).

Campaign signs are a traditional and important means of participating in political campaigns.

> The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas....[O]utdoor signs have played a prominent role throughout American history, rallying support for political and social causes.

Metromedia, Inc. v. City of San Diego, 101 S.Ct. at 2889 quoting Metromedia, Inc. v.

City of San Diego, 26 Cal. 3d 848, 888 (Clark, J. dissenting).*

Any attempt to ban this traditional means of political expression in election campaigns must be subject to the strictest possible scrutiny.

B. The Ordinance Bans a Means of First Amendment Expression in the Traditional Public Forum

Consideration of the place where the regulated speech occurs suggests the

---

* Although Metromedia also involved a type of outdoor sign, the billboards of that case presented far different, and more significant problems than the temporary political signs at issue here. As both this Court and the California Supreme Court observed, a billboard is a "large, immobile and permanent structure" which, "creates a unique set of problems for land-use planning and development." 101 S.Ct. at 2889-2890. A temporary political sign is by its nature not permanent, much smaller and much less obtrusive. It does not, therefore, raise the land-use or planning issues which are unavoidable with billboards. In fact, the San Diego ordinance in question in Metromedia specifically excluded temporary political signs from its regulatory scheme.

second reason that the ordinance here must be subjected to particularly stringent review. As written, the Los Angeles ordinance effectively prohibits posting on all public property.

This Court has long recognized that the public streets, sidewalks and parks are a traditional and important forum for the communication of ideas in a free society. Hague v. C.I.O, 307 U.S. 496, 515 (1939); Perry Education Association v. Perry Local Educators' Association, ___ U.S. ___, 103 S.Ct. 948, 954-955 (1983). Thus, it has consistently held that "[a]ccess to the 'streets, sidewalks, parks and other similar public places...for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly....'" and that in those places "[f]ree expression 'must not, in the guise of regulation, be abridged or denied.'" Grayned v. City of Rockford, 408 U.S. 104,

117 (1972). As recently as this term the Court reemphasized that "streets, sidewalks, and parks, are considered, without more, to be 'public forums'" and that such public forums occupy "a special position in terms of First Amendment protection...." United States v. Grace, 103 S.Ct. at 1706-1708.

The recognition of the special status of the traditional forum has shaped the result in many of the Court's decisions concerning First Amendment expression in public places. It is central to the Court's finding in cases such as Schneider, Jamison, and Martin v. City of Struthers, that a municipality does not have the "power absolutely to prohibit the use of the streets for the communication of ideas." Jamison v. Texas, 318 U.S. at 415. It also helps explain the Court's careful scrutiny of permits, taxes and regulations which place restrictions short of a total

ban on public use of streets, sidewalks and parks for the purpose of expressing ideas and the conclusion that many such restrictions are improper. See, e.g., Hague v. C.I.O., 307 U.S. 496 (1939); Lovell v. Griffin, 303 U.S. 444 (1938); Cantwell v. Connecticut, 310 U.S. 296 (1940); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Niemotko v. Maryland, 340 U.S. 268 (1951); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

Recognition of the special position of the traditional public forum does not mean that regulation which effectively bars or substantially restricts First Amendment activity on public property is in every case impermissible. But such regulation as is permitted cannot be the result simply of convenience or preference. Schneider v. State, 308 U.S. at 161.

Rather, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Grayned v. City of Rockford, 408 U.S. at 116 (emphasis supplied).

Applying this standard, the Court has allowed significant regulation of the rights of free speech in public institutions whose functions are not speech-related such as jails and military bases. Adderley v. Florida, 385 U.S. 39 (1966); Greer v. Spock, 424 U.S. 828 (1976). Less regulation has been permitted in public facilities such as libraries and schools, although the government's right to limit speech to maintain order necessary to carry on the purpose of those institutions has been recognized. Brown v. Louisiana, 383 U.S. 131 (1966); Grayned v. City of Rockford, supra. But it is areas "such as

public streets... and parks, traditionally recognized as centers for public communication of ideas," that are "most protected from any form of regulation." United States v. Douglass, 579 F.2d 545, 548-549 (9th Cir. 1978), citing Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) and Hague v. C.I.O., 307 U.S. 496 (1939). The right to use these public places for expressive activity "may be restricted only for weighty reasons." Grayned v. City of Rockford, 408 U.S. at 115.

The signs at issue in this case were posted on the cross-bars of utility poles in the public right of way alongside streets and sidewalks and were designed to be seen by persons traveling those thoroughfares. They were, therefore, part of the communication of information in one of the "quintessential public forums" -- the streets. Perry Education Association

v. Perry Local Educators' Association, 103 S.Ct. at 955. As a result, sign posting on these cross bars can be banned only for "weighty reasons" that demonstrate that sign posting is "basically incompatible" with normal use of this public property.

Under the facts of this case, therefore, both because of the mode of communication, temporary political signs used for election campaigns, and the place in which that speech takes place, the public forum, this Court must undertake the strictest scrutiny of the Los Angeles ordinance.

C. More Narrow Means Than an Absolute Ban are Available to Achieve the City's Legitimate Interests

Consideration of Justice Frankfurter's remaining two questions -- the method used to restrict and the interests deemed to require the restrictions -- demonstrate why the Los

Angeles ordinance must fail as violative of the First Amendment when the required strict scrutiny is applied. The focus of the inquiry concerning method is on the requirement that the "net of control must not be cast too broadly." Niemotko v. Maryland, 340 U.S. at 282. Where the legitimate interests advanced by the government can be substantially achieved by more narrow means, the ordinance cannot stand. Shelton v. Tucker, 364 U.S. 479, 488-489 (1960); Grayned v. City of Rockford, 408 U.S. at 116-117; United States v. Grace, 103 S.Ct. at 1706.

The most cursory examination of this ordinance reveals that it is too broad, both on its face and as applied. This Court has recently stressed again the importance of assessing the characteristic nature and functions of the particular public forum involved in determining the constitutionality of a regulation or

expression. Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559, 2565-2566 (1981) (restrictions on distributing literature and soliciting which would not be appropriate on public streets upheld on state fairgrounds). The Los Angeles ordinance in question permits no consideration of the nature of the public property involved. It simply bans all sign posting on all such property.

The interests advanced by the City to justify its ordinance do not apply uniformly to all of the many varied types of public property. Nor do they justify the shotgun approach which Los Angeles has taken to the problems which sign posting present.

The first interest identified by the City is aesthetics -- in the City's words "avoidance of visual clutter." In the long history of this Court's rejection

of ordinances prohibiting speech in the public forum, "[t]he easiest cases have been those in which the only interest opposing free communication was that of keeping the streets of the community clean." Niemotko v. Maryland, 340 U.S. at 276. Exercise of First Amendment rights often brings as a necessary cost some harm to the aesthetics of the community. Parades cause debris and disruption, picketing causes noise, leaflets cause litter. But "the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution." Schneider v. State, 308 U.S. at 163. Schneider and the cases that followed require invalidation of the ordinance insofar as it rests on the interest of avoiding visual clutter.

It is with regard to the issue of aesthetics that the City's failure to make any distinction among types of public property is most apparent. There are some types of public property, for example a golf course or an arboretum, where posting of temporary political signs might well be basically incompatible with the aesthetics of the place involved. The same is not true, however, of busy industrial areas or of teaming business streets already lined with commercial signs. The argument that aesthetics can justify prohibiting the public's right to post temporary political signs in its traditional forum in such industrial or commercial areas fails to consider either the importance of political speech or the need to take account of the nature of the place regulated which this Court has so often stressed.

Moreover, both aesthetics and the second justification advanced by the City,

traffic safety, can be substantially achieved -- to the extent possible in a modern urban society -- by measures far less restrictive of the freedom of expression than an absolute ban. Temporary signs can be regulated as to time of posting, size, construction and number permitted. An ordinance could be passed specifically prohibiting signs that obstruct drivers' views of traffic signals or signs. See, Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976). Those portions of public property "basically incompatible" with sign posting could be closed to any such posting.

Whether any more is gained in aesthetics and traffic safety by an absolute ban than by such a narrower regulatory scheme is extremely doubtful. Los Angeles already permits posting of private property, permits commercial signs and permits billboards. It is impossible

to believe that the City must for reasons of traffic safety and aesthetics proscribe a fifteen inch by forty-four inch temporary sign advertising the candidacy of Roland Vincent while it would permit rock star Olivia Newton-John, one hundred times life size, to gaze down suggestively from a privately owned billboard at the traffic passing below on Sunset Strip in Los Angeles.

Further, the City's willingness to permit posting of private property demonstrates the City has determined that traffic safety and aesthetics are not "transcendent objective[s]." Cf., Carey v. Brown, 447 U.S. 455, 465 (1980). Like the City of San Diego in Metromedia, the City of Los Angeles "has conceded that some communicative interests [here the right of those controlling private property to post that property] are stronger than its competing interests in esthetics and

traffic safety." 101 S. Ct. at 2899. It is difficult to see how, having made that concession to private posting, the City can maintain that those same interests in traffic safety and aesthetics can outweigh the preeminent First Amendment right to use the traditional public forum for political speech. Further, the City's reliance on banners hung over city streets and placards carried by individuals as "alternative means" left open by the ordinance makes a mockery of its now professed concern for traffic safety. Brief for Appellant at 11-12, 21.

The City's final justification for its ordinance is preservation of public property for its "normal" use. Most public property has a use other than providing a forum for the expression of ideas. But a street's purpose to convey traffic has never precluded the recognition that it may also be used for a demonstration or parade. Shuttlesworth v. City of Birmingham, 394

U.S. 147, 152-153 (1969). Similarly, a utility pole's only purpose is not to permit signs to be posted. But so long as the signs are posted in a way which does not interfere with the lights and wires attached to the pole and which does not hinder those responsible for maintenance and repair, posting of signs is not basically incompatible with the "normal" use. If streets, sidewalks, and parks are reserved solely for traffic and physical enjoyment, the term "normal" would effectively swallow up the First Amendment. Plainly, public expression in the public forum is a "normal" use for constitutional analysis. Indeed, as the cases cited at pp. 19-20 supra, clearly demonstrate, free expression is itself a "normal" use of a public forum.

The City argues without substantiation that "[a]ffixing signs, handbills and the like to street lamp

posts, hydrants, electric lights, utility poles, street signs and traffic signs, for example, is basically incompatible with the normal and primary functions and uses of those devices." Brief for Appellant at 23. The uncontradicted testimony of Patrick D. Daley, President of COGS, establishes that the signs posted on behalf of Roland Vincent by COGS were not incompatible with the primary use of the objects to which they were attached. The sign posting methods employed by COGS ensure that its signs can be removed without a trace from the property to which they are affixed. COGS expressly instructs its employees not to post signs on hydrants, street or traffic signs, or anyplace else where they might constitute hazards or interfere with the "normal" use of the property. Declaration of Patrick D. Daley in Support of Motion for Partial Summary Judgment, ¶ 5-7 Joint Appendix at 148. Indeed, the

methods of sign posting employed by COGS could serve as the basis of a narrowly drawn regulation that would protect the "normal" use of public property just as effectively as the planned prohibition of the ordinance without depriving the public of use of its own property for expressive purposes.

D. Equivalent Alternative Means of Expression Are Not Available and Would, in any Case, be Irrelevant

It is no answer to the defects in this ordinance that alternative means of expression are available. See, Brief for Appellants at 25-26. In the first place, no real alternative is available. As this Court recently recognized, signs are a particularly potent means of expression. Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85, 93 (1977). And, in particular, "political posters have unique advantages." Baldwin v. Redwood City, 540 F.2d at 1363. They are

especially useful in obtaining name recognition for candidates without substantial campaign chests to finance their election. The availability of alternative, far more expensive means of political advertising is more theoretical than actual for many underfinanced local campaigns. Like the distribution of handbills, signs are "essential to the poorly financed causes of little people." Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

In any case, as this Court has often stated "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schad v. Borough of Mount Ephraim, 101 S. Ct. at 2187; Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975) (availability of privately owned theater would not justify impermissible

prior restraint on play in a publicly owned theater); Schneider v. State, 308 U.S. at 163. Hence, the availability of an alternative forum -- if one were available -- is entirely irrelevant.

This case then presents two opposing interests. The first is the public's right to use the traditional public forum for expressive activities directly related to a political campaign. The other is the public interest in traffic safety and in the maintenance and aesthetics of public property. The balance to be struck between them cannot permit blanket prohibition of political sign posting on public property. Political expression in the public forum is an activity at the heart of our political values. The competing interests raised here are ones which Los Angeles, by permitting posting of private property, has determined are not transcendent objectives

and which could be substantially achieved by far more narrowly drawn regulations. In these circumstances the City's absolute ban on this important means of political expression must be struck down as violative of the First Amendment.

III. THE ORDINANCE VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE FOURTEENTH AMENDMENT BECAUSE IT HAS A DISPROPORTIONATELY SEVERE IMPACT ON THE RIGHTS OF EXPRESSION OF THOSE LEAST ABLE TO PROTECT THEMSELVES

This ordinance also violates the Equal Protection Clause of the Fourteenth Amendment. In Carey v. Brown, supra, 447 U.S. at 461-462, this Court held:

> When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized. See, also, Police Department of Chicago v. Mosley, 408 U.S. 92, 98-99 (1972).

The need for heightened judicial scrutiny is particularly acute here.

> "[I]t is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day." Buckley v. Valeo, 424 U.S. 1, 52-53 (1976). Indeed "speech concerning public affairs is . . . the essence of self-government," Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

CBS, Inc. v. F.C.C., 453 U.S. 367, 396 (1981).

Political signs are a particularly accessible means of candidates making themselves known enough so that their candidacies will be taken seriously and their views considered and evaluated. As the Ninth Circuit observed in Baldwin v. Redwood City, 540 F.2d at 1368, "with exception of handbills, [temporary political signs] ...are the least expensive means by which a candidate may achieve name recognition among voters in a local election." Name recognition is essential under

statutory procedures which require a candidate for public office to collect thousands of signatures before qualifying for the ballot. See, e.g., Storer v. Brown, 415 U.S. 724 (1974).

Los Angeles permits political sign posting on private property while proscribing it on public property. It thereby discriminates against the views of those who do not control private property. As James Madison observed in Federalist No. 10, "Those who hold and those who are without property have ever formed distinct interests in society." It is easy to envision numerous current issues, including rent control, property taxes and zoning, on which the views of those holding property and those who do not are likely to differ. In Los Angeles, sign posting is likely to be virtually unavailable on these controversial issues for the views of those

without private property and for the candidates who support those views.

The ban on sign posting also discriminates against a class of persons, the poor. It is the poor who are unlikely to have the means for private property on which they may post signs. Yet it is the poor who have most need for this particularly inexpensive means of communicating political messages.

When persons whose expression is most hampered by an ordinance are the same persons least able to protect their interests through ordinary political channels, the judiciary must uphold those interests through the Equal Protection Clause. "Courts must police inhibitions on expression and other political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out." J. Ely, Democracy and Distrust: A Theory of

Judicial Review 106 (1980). And this Court recently noted, "[I]t is especially difficult for the [government] to justify a restriction that limits political participation by an identifiable political group whose members share a particular... economic status....'The inquiry is whether the challenged restriction unfairly or unnecessarily burdens "the availability of political opportunity."'" Anderson v. Celebrezze, ___ U.S. ___, 103 S.Ct. 1564, 1572 (1983).

The ordinance at issue here fails the test. The City claims that aesthetics and traffic safety require banning of political signs on public property. It makes no such claim about political signs on private property which, unregulated, have the same ability to affect both of those interests. The community's legitimate interest in aesthetics and traffic safety can be adequately protected by

appropriate regulation on public property just as easily as on private property. The real result of the City's regulatory scheme is to deny this particularly accessible means of political expression to those candidates without the means to obtain access to private property. Thus, the absolute prohibition of temporary political signs on public property violates the Equal Protection Clause because it unnecessarily burdens the availability of political opportunity for an identifiable group sharing a particular economic status. Anderson v. Celebrezze, 103 S.Ct. at 1572.

CONCLUSION

For all the foregoing reasons, Amici respectfully urge that the Court affirm the decision of the Ninth Circuit in holding the ordinance at issue unconstitutional.

Dated: June 15, 1983

NEIL H. O'DONNELL
LEO F. ORENSTEIN
ROGERS, JOSEPH, O'DONNELL & QUINN

MARGARET C. CROSBY
ALAN L. SCHLOSSER
AMITAI SCHWARTZ
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

FRED OKRAND
AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA